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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT PHILLIPS and ARNOLD TOLBERT, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PHILIP A. GILLIS
Attorneys for Petitioner
5th Floor, American Title Building
Detroit, Michigan 48226
(313) 962-8210

Interstate Brief & Record Co., 1038 Beaubien St., Detroit, Michigan 48226
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Robert Phillips and William Arnold Tolbert, Jr., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered July 15, 1974.

OPINIONS BELOW

The District Judge did not file an opinion. The opinion of the Court of Appeals is reported at 496 F 2d 1395. It is printed as Appendix A, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on July 15, 1974 (Appendix B, *infra).* A timely Petition for Rehearing was denied on November 5, 1974 (Appendix C, *infra).* Jurisdiction is conferred upon this Court by 28 USC 1254.

QUESTIONS PRESENTED FOR REVIEW

I.

In 1972, Border Patrol Agents, operating a checkpoint along an interstate highway a few miles from the Mexican border, stopped and searched without cause or reasonable suspicion every northbound vehicle. Should contraband discovered in one such search be suppressed either independently of or because of this Court's 1973 decision in *Almeida-Sanchez vs. United States?*

II.

Where a new statutory schedule of controlled substances is required to be updated and republished within a specified period following enactment, may one be proceeded against criminally for possession of a controlled substance on the basis of a *nunc pro tunc* republication after the date of the alleged offense?

III.

Where arresting officers seize a substantial sum of untainted money from a defendant, does the judge before whom the defendant is to be tried have the authority and duty to order the money returned to the defendant? Does the retention of the money by the government presumptively deny the defendant his right to counsel, his right to compulsory process and his right to a fair trial?

IV.

Where the evidence of Defendant's guilt is entirely circumstantial and is equivocal on the question of his guilt, is he entitled to a judgment of acquittal?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV, provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated . . .

United States Constitution, Amendment VI, provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

8 USC 1356; 21 USC 811 and 812 are set out in Appendix D, *infra.*

STATEMENT OF THE CASE

Petitioners Robert Phillips and William Arnold Tolbert, Jr., were indicted for intentionally possessing with intent to distribute apprximately 230 pounds of marijuana in violation of 21 USC 841 (a) (1). Defendants were tried without a jury and convicted.

I.

VALIDITY OF THE SEARCH.

On the morning of May 5, 1972, shortly after 8:00 o'clock, Petitioners, proceeding north on the main highway from Laredo to San Antonio, were stopped for an immigration search conducted by border patrol officers at a highway checkpoint, located approximately ten miles north of Laredo and about four air miles from the Mexican border.

At the time the officers "had no reason to suspect anything". They were conducting what they called a "blitz", checking for illegal aliens by stopping and searching every vehicle that came through.

Petitioner Phillips who was driving was asked to open the trunk, but he said he did not have a key. Petitioners were then detained about ten minutes until the trunk could be searched by removing the back seat. Inside the trunk were approximately 230 pounds of marijuana. Taking a dim view of this, the agents arrested Petitioners.

A pretrial Motion to Suppress Evidence, consideration of which was deferred until trial, was denied.

II.

WHETHER MARIJUANA WAS CONTROLLED ON MAY 5, 1972.

The Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC 801 *et seq* was enacted October 27, 1970. Section 202 [21 USC 812] initially established five schedules of controlled substances with a proviso that the schedules be republished on a regular basis commencing April 27, 1972.[1]

The Director of the Bureau of Narcotics and Dangerous Drugs did not republish the schedules until May 8, 1972. The republication appeared in the issue of the Federal Register for Friday, May 12, 1972, 37 FR 9545 *et seq.* It contained the following preamble:

> The Comprehensive Drug Abuse Prevention and Control Act of 1970, Section 202 (a) [21 USC 812 (a)], requires that the schedules of controlled substances established by that Act be updated and republished on a semiannual basis during the two-year period beginning one year after the effective date of that Act. The effective date of that Act was October 27, 1970. Pursuant to the mandate of Section 202 (a), therefore, the Director hereby orders the publication of the schedules of controlled substances as of April 27, 1972.

Prior to trial, Petitioners moved to quash the indictment on the grounds that marijuana was not a controlled substance as of the date of the alleged offense. The motion was denied without opinion.

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[1] The schedules established by this Section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

III.

RETENTION OF PHILLIPS' MONEY.

When arrested, Petitioner Phillips possessed approximately $5100 in currency. There was no evidence that it was contraband. A day or two later, the money was seized by the Internal Revenue Service under a jeopardy assessment.

Prior to trial Phillips moved for the return of the money claiming that he needed it to obtain counsel and otherwise prepare his defense. The motion was denied by a calendar sheet notation of the trial judge which read:

> On motion of Defendant's return of funds. Monies in the defendants' [sic] possession at the time of arrest, while held temporarily by the Marshal, have been seized by the Internal Revenue Service under a jeopardy assessment. I consider the dispute between the defendants' [sic] and the Internal Revenue Service properly to belong in another forum and not here. The motion is denied.

IV.

SUFFICIENCY OF THE EVIDENCE AS TO PETITIONER TOLBERT.

On May 4 Phillips rented the car in which he and Tolbert were driving from the Avis Rent-a-Car Agency in Harlingen, Texas. Because they try harder, Avis made certain that the car was clean, the trunk empty, and that Phillips had trunk and ignition keys. Tolbert was with Phillips at the time the car was rented.

Airline tickets and a motel bill found with Petitioners at the time of their arrest indicated that they had left Detroit together, flying to Texas. They had spent the night prior to their arrest at the same motel.

While waiting for the car to be searched, Tolbert told one of the agents that he had some family trouble and had come to Texas just to see what was happening, what was going on. Phillips told the other agent that he and Tolbert were in the real estate business and made frequent trips to Texas, driving all over the state.

In affirming Tolbert's conviction in the face of his challenge to the sufficiency of the evidence, the Court of Appeals said:

> There are no facts in this case tending to establish exclusive possession and knowledge by Philips except that the car was rented by him and he was the driver [Appendix A, *infra*, p. 8a].

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE EVIDENCE FROM THE SEARCH SHOULD BE SUPPRESSED.

1. The immediately obvious question here is whether the 1973 decision of *Almeida-Sanchez* v *United States*, 413 US 266, fixes the standards for validity of this 1972 search.

The circuits are divided. The Tenth says *Almeida-Sanchez* applies, *United States* v *King*, 485 F 2d 353 (1973). The Ninth says it doesn't, *United States* v *Bowen*, 500 F 2d 960 (1974). The Fifth Circuit's *latest* ruling is consistent with the Ninth, the decision below and *United States* v *Miller*, 492 F 2d 37 (1974). In urging the Court to resolve the conflict, we make the following points.

a. Almedia-Sanchez is not new doctrine.

In *Miller,* the Fifth Circuit saw an analogy between *Almeida-Sanchez* and *Rodrigue* v *Aetna Casualty and Surety Company,* 395 US 352 (1959). *Rodrigue* filled a "gap" in federal law, and in *Chevron Oil Company* v *Huson,* 404 US 97 (1971), this Court said it would be unfair to apply *Rodrigue* retroactively to bar a litigant's claim under a recently-determined-applicable statute of limitations.[2]

But *Almeida-Sanchez* did not fill any gap in existing law. No new ground was plowed. No case was overruled. Only after citing and analyzing its decisions going back half a century did this Court conclude:

> . . . neither this court's automobile search decisions, nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case. 413 US at 272.

In deciding whether to grant certiorari, the Court should note that it has already agreed to rule on a closely related issue in *United States* v *Ortiz,* 73-2050, certiorari granted October 15, 1974, 43 LW 3185.[3]

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[2] If certiorari is granted, we would make no point of the difference between civil and criminal cases. Although different values are in litigation, we perceive no distinction upo nwhich retroactivity should turn.

[3] *Ortiz* involves a search after *Ameida-Sanchez* but before decision in *United States vs. Bowen,* 500 F 2d 960 (CA 9 1974) and the issue is whether Bowen's interpretation of *Almeida-Sanchez* should be applied retroactively.

b. Even as new doctrine, Almeida-Sanchez should be retroactive.

The three-pronged test of *Stoval*[4] has divided this Court and left the lower courts uncertain on the issue of retroactivity. We would urge, if review is granted, that in direct appeals such as this where the integrity of the guilt-determining process is not involved, retroactivity would be allowed unless one of the litigants has relied upon the prior law *to his detriment.* Such a rule would have simple and certain application.

Thus, a pretrial identification made in an essentially fair manner but without additional safeguards which the Court later determines to be necessary to vindicate a suspect's constitutional rights would be admissible because the police could no longer have a meaningful pretrial lineup. Similarly, a pretrial interrogation of a suspect which generated a voluntary inculpatory statement would not be suppressed because of a failure of the police to anticipate warning requirements of a later Court ruling. If this Court were to overrule *Cady* v *Dombrowski,* 413 US 433 (1974), it would be unfair to give the overruling decision retroactive effect because the police, relying on *Cady* to their detriment, would have lost forever the opportunity to search with or without a warrant.

But *Almeida-Sanchez* did not condemn the search because of any formalism such as the failure of the Border Patrol

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[4] The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retrospective application of the new standards.

Stovall vs. Denno, 388 US 293, 297 (1967).

Agents to precede their search with, "Simon says, may I search your car?" The search was condemned because it was unreasonable. Nothing the agents could have done in our case in anticipation of *Almeida-Sanchez* would have made the search reasonable.[5] Their reliance on earlier Fifth Circuit law, therefore, was not to their detriment.

c. A Prospective-only rule should be uniformly applied.

Immediately after *Almeida-Sanchez* was decided, the Fifth Circuit began to give it full retroactive effect. In 1973 at least three convictions were reversed because of it. *United States* v *Byrd,* 483 F 2d 1196; *United States* v *McKim,* 487 F 2d 305; *United States* v *Speed,* 489 F 2d 478. See also *United States* v *Lonabough,* 494 F 2d 1957, 1960 (1974), where *Almeida-Sanchez* was held to be "the governing standard" for a December 1972, search.

There is an element of unfairness whenever a litigant whose case is still in the pipeline of direct review is denied the benefit of the current ruling of the Court on a point carefully preserved from time of arrest until final review.[6] But it is particularly unfair when the jurisdiction in which the case arises grants retroactivity to some and not to others. Petitioners are in the unhappy position of having

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[5] The suggestion by Justice Powell of area-wide warrants is not a holding of the Court.

[6] Because the adversary system relies so heavily on the parties to look after their own interests during trial, it is unconscionable to disregard a valid claim still pressed and not finally disposed of, just because someone else got to Washington first.

Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus,* 59 Virginia LR 927, 956 (1973).

been searched too soon and having had their appeal decided too late.[7]

2. A question left open in *Almeida-Sanchez* is the possible distinction between searches at temporary or permanent check-points and those by roving patrols.[8] The question will probably be resolved when the Court decides *Ortiz, supra.*

We should be allowed to participate in that resolution.

There probably are factual differences between our case and that of *Ortiz* which would allow the Court to fully expound its decision by holding rather than dictum. For example, ours was a temporary checkpoint[9] and *Ortiz,* judging from Law Week's synopsis, 43 LW 3185, involves a fixed checkpoint search.

Needless to say, it would be our position, if certiorari is granted, that there is no constitutional distinction between roving patrol searches and those at temporarily or permanently fixed points which are not the functional equivalent of the border.

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[7] Perhaps a fair solution would be to hold that *Miller,* overruling prior Fifth Circuit decisions that *Almeida-Sanchez* is retroactive, should not apply to cases such as Petitioners' which were briefed and argued prior to announcement of decision in *Miller.*

[8] Nor does this case involve the constitutional propriety of searches at permanent or temporary checkpoints removed from the border or its functional equivalent.

413 US at 276 (concurring opinion of Justice Powell).

[9] The Court below described the checkpoint as being maintained "with at least some degree of regularity," citing other decisions involving checkpoints north of Laredo (1a, *infra*). Putting to one side that findings should not be made on the basis of records made in other cases in which petitioners did not participate, cf. *United States vs. Baca,* 368 F Supp 398 (DC Cal 1973), the checkpoint in *United States vs. McDaniel,* 463 F 2d 129, to which the Court refers, was *seven* miles north of Laredo and *eight* miles from the border.

3. Our Petition presents a facet to our Fourth Amendment argument not considered in *Almeida-Sanchez*. Border Patrol Agents, such as the ones who arrested Petitioners, are specially designated as Custom Agents. They wear two hats, so to speak, as noted in *United States* v *McDaniel*, 463 F 2d 129, 134 (CA 5 1972). If, as to away-from-the-border searches, those by immigration officials are to be judged by a different standard than those by customs officials, then an officer wearing both hats should be governed by his more restricted authority.

This is simply a rule of fairness. It is nearly impossible to challenge the testimony of such a dual agent as to his reasons for his search. Here, one agent, stating his purpose in searching the trunk, said *"Basically* it was to check for illegal aliens." Another agent said, "My *primary* function was illegal aliens." Compare *Contreras* v *United States*, 291 F 2d 63 (CA 9 1961) which dealt with similar testimony.

> [The Border Patrol Agent] testified that he might have found a document in the sack that would have helped him to make up his mind regarding the citizenship of the Puerto Rican. We are inclined to believe this was a consideration which must have occurred to [him] sometime after the events in question transpired.

The decisions of the Fifth, Ninth, and Tenth Circuits indicate that the vast majority of contraband-in-a-car prosecutions are initiated by immigration officials. Inevitably, the testimony discloses that the "basic" or "primary" purpose of the search is to look for aliens—aliens under a seat of a sportcar,[10] aliens behind a six-inch panel,[11] and aliens

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[10] *United States vs. Winer*, 294 F Supp 731 (DC Texas 1969).

[11] *Valenzuela-Garcia vs. United States*, 425 F 2d 1170 (CA 9 1970).

in the pocket of a jacket.[12] The fact that the immigration officers turned up contraband simply demonstrates their remarkable serendipity.

II.

WHETHER MARIJUANA WAS CONTROLLED ON MAY 5, 1972.

The legislative history of the Act under which this prosecution was brought clearly discloses the concern of Congress for enlightened regulation of controlled substances. The House report frankly acknowledged the lack of scientific data to justify some of the criminal sanctions being imposed under the new law. There was no greater area of doubt than with reference to marijuana, 1970 US Cong. & Adm. News, 4577 *et seq.*

The statute, consequently, provided that the schedules of controlled substances should be reviewed on a regular basis. 21 USC 811 gives the Attorney-General *permission* to add to or remove substances from the schedules or transfer between schedules. 21 USC 812 *requires* that the schedules be updated and republished commencing April 27, 1972.

But the Director of the Bureau of Narcotics and Dangerous Drugs did not act until May 8 when he attempted to republish the schedules *nunc pro tunc* as of April 27. See the Federal Register for Friday, May 12, 1972, 37 FR 9545.

We suggest that there are two reasons why marijuana did not continue as a controlled substance beyond April 27.

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[12] *Roa-Rodriguez vs. United States*, 410 F 2d 1206 (CA 10 1969).

a. The Schedules were intended to be temporary.

In establishing the schedules, Section 812 (a) provides that the "schedules shall *initially* consist of the substances listed in this Section." While we have emphasized *initially* in quoting the statute, the only word emphasized in italics in the lengthy Conference Report was *initially*.

> Subsection 202 (a) establishes five schedules and provides that these schedules shall *initially* consist of the substances listed in Section 202. The subsection further provides for a semi-annual updating and republishing of the schedules during the two-year period beginning one year after the date of enactment of Title II of the Act.
> 1970 US Cong. & Adm. News 4606
> (Emphasis as in the original.)

21 USC 812 (c) provides, with our emphasis:

> Schedules I, II, III, IV and V shall, unless and until amended *pursuant to Section 811 of this Title,* consist of the following drugs or other substances . . .

The italicized portion of the statute indicates that, while the schedules will continue pending their permissive modification by the Attorney-General, they will not continue beyond the date for mandatory updating. If it were the intention of Congress that the schedules continue in force indefinitely, the italicized portion of the statute would have been omitted so that the statute would read, "The schedules, unless and until amended, shall consist of . . . ".

To reject our interpretation, one must find that, first, Congress used a meaningless phrase in referring to Sec-

tion 811, and, second, Congress assumed that its mandate in Section 812 would be ignored.

The Director of the Bureau of Narcotics and Dangerous Drugs apparently construes the statute consistent with our position. Otherwise, why would he say " . . . the Director hereby orders the publication of the schedules of controlled substances *as of April 27, 1972.*"

It is well settled that a violation of administrative regulation, made within the scope of the legislative act, may be made a criminal offense, *United States vs. Newman,* 44 F Supp 817 (DC Ill 1942), but there is no authority under the Constitution to allow regulations to take effect *nunc pro tunc.*

b. Congress did not make the required findings with reference to marijuana.

Marijuana is a Schedule I substance. In order for it to be in Schedule I, certain findings must have been made. They are set out in Section 812 (b).

> The findings required for each of the schedules are as follows:
>
> (1) Schedule I.—
>
> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
>
> (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

In enacting the statute, Congress made no such findings with reference to marijuana. In the legislative history, the Conference Report states, 1970 US Cong. & Adm. News 4577:

> The extent to which marijuana should be controlled is a subject upon which opinions diverge widely. There are some who not only advocate its legalization but would encourage its use; at the other extreme there are some States which have established the death penalty for distribution of marijuana to minors.

The report then lists fables and facts concerning marijuana and its use, a fair reading of which indicates Congress' uncertainty as to whether marijuana met the criteria for inclusion in Schedule I. The report then continues, *id* 4579:

> The Committee requested recommendations from the Department of Health, Education and Welfare concerning the appropriate location of marijuana in the schedules of the bill, and by letter of August 14, 1970, (printed in this report under the heading "Agency Reports"), the Assistant Secretary for Health and Scientific Affairs recommended "that marijuana be retained within Schedule I *at least until the completion of certain studies now underway.*"
>
> In addition, Section 601 of the bill provides for establishment of a Presidential Commission on marijuana and drug abuse. The recommendations of this Commission will be aid *in determining the appropriate disposition of this question in the future* (Emphasis supplied).

Title V of the Act makes certain specific Congressional findings concerning the use of marijuana. It is reprinted as a note to 42 USCA Section 242 (p. 24 of the Current Pocket Parts). There, Congress specifically found that "with respect to the use of marijuana, there is a lack of an authoritative source for obtaining information involving the health consequences of using marijuana."

Thus it is clear that Congress did not make the findings necessary to include marijuana in Schedule I, and neither has the Director of the Bureau of Narcotics and Dangerous Drugs.

Certainly the Director could not add a substance to the schedule without making the findings required by the statute. To allow otherwise would be to allow delegation of legislative authority, *Yakus vs. United States,* 321 US 414 (1944).[13] It would seem equally clear that the Director could not continue a substance in a schedule by his inattention to the plain legislative command to update and republish on the basis of current findings.

The Court below ignored this issue in its opinion. There is a strong argument for this Court not to follow suit. The point we raise involves only marijuana. We make no point of the fact that in finally republishing the Director did not make the findings which the statute clearly requires him to make. If we are correct in our position, a ruling in this case would affect only prosecutions relating to marijuana which occurred between April 28 and May 12, 1972. Thus this case is a peculiarly appropriate vehicle for this Court to tell the Director that he must follow the statute.

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[13] [The essentials of the legislative function] are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained by relevant data by a designated administrative agency, it directs that its statutory command shall be effective. *Id,* at 424, 425.

III.

WHETHER THE DISTRICT JUDGE SHOULD HAVE SUMMARILY ORDERED THE RETURN OF PETITIONER PHILLIPS' MONEY.

As far as we know, only one Supreme Court Justice has ever addressed himself to this problem, Justice Washington, sitting as a Circuit Justice in *Ex parte Craig,* 4 Wash Circuit Reports 710, Federal Cases No. 3, 321 (1827). We cannot add to what he said there about the power and duty of a criminal trial judge to summarily order the return of the defendant's property taken at the time of his arrest.

> . . . I consider the money to be constructively in possession of the court and subject to its order. The Constitution, by one of its amendments, has secured to every person under a criminal prosecution, the right to have compulsory process for obtaining witnesses in his favor, and the privilege of having the assistance of counsel to defend him. But what would these securities avail the accused, if a judicial officer, or any other officer of the court may legally deprive him of the means of obtaining his witnesses, and of employing the counsel in whom his confidence is placed; by detaining the money found upon his person, which, in many cases may be his all? To turn the prisoner over to his ordinary remedy, by suit against the officer, which might not be decided until long after his fate in the criminal prosecution had been fixed, would be a mockery of justice, and a reproach to the law.
>
> *Id,* 710-711.

The money was not subject to execution under Texas law, *Tones vs. The State*, 48 Texas Cr. Rep. 363 (1905). To the same effect, see *Hubbard vs. Garner*, 115 Mich 406, 73 NW 390 (1897). See also *In re Ginsberg*, 146 F 2d 749 (CA 2 1945); *Weinberg vs. United States*, 126 F 2d 1004 (CA 2 1942).

The question is important for this Court to review because of the prevailing practice of law enforcement agencies to alert the Internal Revenue to the seizure of money so that a jeopardy assessment can be made. Only if the money is contraband should it be withheld from a defendant when it may represent his only resource to obtain counsel and otherwise prepare his defense.

IV.

WHETHER AN IMPROPER YARDSTICK WAS USED TO MEASURE THE SUFFICIENCY OF THE EVIDENCE AS TO PETITIONER TOLBERT.

First, let us assure the Court that we recognize that a question turning on the sufficiency of the evidence to support a lower court judgment has no cert appeal. We would probably have a better chance of getting the Court to look at our old vacation movies than to review the sufficiency of the evidence in even this brief 100-page transcript. But the question we raise is far more fundamental.

The standard of certainty to support a conviction—proof beyond a reasonable doubt—is a Constitutional constant in our jurisprudence, *In re Winship*, 397 US 368 (1970). Unfortunately, however, that constant lies on a bed of shifting sand in certain important areas of the criminal law—constructive possession and circumstantial evidence to name but two.

> Judicial decisions have at best established ill-defined guidelines as to the evidentiary requirements necessary to prove constructive possession. Especially in reported cases growing out of narcotic prosecutions the opinions are usually built upon involved and obscure reasoning which certainly suggests judicial subjectivity . . . The law of constructive possession is what we will say it is in our next opinion. (Concurring opinion). *United States vs. Holland,* 445 F 2d 701, 703-704 (CA DC 1971).[14]

In this case, TOLBERT'S knowledge and constructive possession of the marijuana was determined on the basis of circumstantial evidence. Prior to 1954, most courts had a satisfactory yardstick to follow in measuring circumstantial evidence—it must be such as to exclude every reasonable hypothesis other than that of guilt. However, in

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[14] TOLBERT was a passenger in a car in which marijuana was concealed inside suitcases which were inside of a locked trunk to which TOLBERT did not have a key. There was no odor of either mothballs or marijuana detectible in the car until after the agents opened the back seat. Whatever difficulty the courts have had in defining the concept of constructive possession, no court has held this to be sufficient evidence of knowing possession.

Guevara vs. United States, 242 F 2d 745 (CA 5 1957);

Cuthbert vs. United States, 278 F 2d 220 (CA 5 1960);

Ledet vs. United States, 297 F 2d 737 (CA 5 1962);

United States vs. Lowry, 456 F 2d 341 (CA 5 1972);

Arellanes vs. United States, 302 F 2d 603 (CA 9 1962);

Delgado vs. United States, 327 F 2d 641 (CA 9 1964);

United States vs. Bethea, 442 F 2d 700 (CA DC 1971).

Perhaps this argument has no place in our Petition, but we couldn't resist pointing it out at least in footnote.

Holland vs. United States, 348 US 121 (1954), this Court ruled that, if a jury is properly instructed on reasonable doubt, an additional instruction of the exclusion of every innocent hypothesis is confusing and unnecessary.

Unfortunately, many courts read *Holland* as rejecting the yardstick as a principle of law, e.g., *United States vs. Conti,* 339 F 2d 10 (CA 6 1964); *United States vs. Nelson,* 419 F 2d 1237 (CA 9 1969); *United States vs. Taylor,* 464 F 2d 240 (CA 2 1972).

This Court was not abandoning as a principle of law its rule that circumstantial evidence must not be equivocal on the question of guilt.

> . . . To establish the intent, the evidence of knowledge must be clear, not equivocal.
>
> *Direct Sales vs. United States,* 319 US 703, 711 (1942).
>
> The proof, by the very nature of the crime [of conspiracy] must be circumstantial . . . but this does not mean . . . that the evidence may be equivocal . . .
>
> *Id,* at 714.

This test was repeated in the post-Holland decisions of this Court. See *Ingram vs. United States,* 360 US 672, 680 (1959), quoting *Direct Sales* with approval. In *Barnes vs. United States,* 413 US 837, 845 (1973), concerned not with jury instructions but sufficiency of evidence, this Court in sustaining a conviction measured the proofs as follows:

> The evidence . . . provided no plausible explanation for such possession consistent with innocence.

Ironically, the only Circuit which correctly (and consistently until the decision below) read the *Holland* decision was the Fifth Circuit. See, for example, *Cuthbert vs. United States,* 278 F 2d 220 (1960).

The difficulty with abandoning such a logical test for determining as a matter of law proof beyond a reasonable doubt—that the circumstantial evidence exclude every reasonable hypothesis of innocence—is that the courts now have no rule whatsoever against which to measure the sufficiency of evidence in such cases. Each case must be decided *ad hoc.* It is no wonder, then, that on occasion, judicial hands have been thrown up in frustration in attempting to find a guiding principle.

> Some of our decisions have suggested a test [to determine sufficiency of circumstantial evidence] . . . However, in at least two decisions of this Court, it has been said that, on review, this Circuit applies no special rule!! *Foster vs United States,* 318 F 2d (CA 9 1963) (Exclamation marks supplied.]

See also the acknowledgment of at least one judge of the Sixth Circuit that since *Holland* he hasn't always been able to steer an even course in this area, *United States vs. Morgan,* 469 F 2d 83 (1972).

In *Taylor, supra,* the Second Circuit renounced the inconsistent-with-innocence test, 464 F 2d at 244. But, the logic of the test being so compelling, the Court could not avoid using it. The ultimate sentence of the opinion, there affirming the conviction, said there was "an *inescapable inference* of intent to defraud." Isn't this the inconsistent-with-innocence rule?

We ask the Court to review the sufficiency of the evidence in this case only because it is necessary in order for the Court to rule on the yardstick used by the Court below. See *Morissette vs. United States,* 342 US 246 (1951) where this Court had to perform a similar function in order to announce one of the more important decisions of the past quarter century.

In assessing TOLBERT'S guilt, the Court below said:

> There are no facts in this case tending to establish exclusive possession and knowledge by Phillips except that the car was rented by him and he was the driver.

This language appears to place the burden of proof on TOLBERT, but that is not our principal complaint here. What the Court was doing was rejecting its prior holding in *Cuthbert,*[15] and holding that evidence consistent with guilt would sustain a conviction even though it spoke with equal voice that the defendant was innocent.

Winship guaranteed that a criminal conviction must rest on proof beyond a reasonable doubt. But that guarantee is an empty promise unless this Court gives the lower courts a yardstick by which to measure reasonable doubt.

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[15] ". . . in a case where the evidence relied upon to establish guilt is entirely circumstantial, it is essential to a just decision by the District Judge that the evidence makes out a fact case for the decision of the jury, that the Court conclude that the jury might reasonably find, not only that the evidence is consistent with a finding of guilt but that it is not consistent with any other reasonable conclusion. If this is not so, a verdict of guilty beyond a reasonable doubt, based wholly on circumstantial evidence, though it keeps the promise of a fair trial to the ear, breaks it to the hope."

278 F 2d at 224-225.

RELIEF REQUESTED

For the foregoing reasons, Petitioners pray that their Petition for Certiorari be granted.

Respectfully submitted,

Philip A. Gillis
Attorney for Petitioners
5th Floor, American Title Building
Detroit, Michigan 48226
962-8210

Dated: Detroit, Michigan
November 27, 1974

APPENDIX A

OPINION BELOW

(Dated and Filed July 15, 1974)

Before WISDOM, GODBOLD and INGRAHAM, Circuit Judges.

GODBOLD, Circuit Judge:

The appellants were convicted in a nonjury trial for possession of 230 pounds of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a-(1). The contraband was discovered on May 5, 1972, in the locked trunk of an automobile rented and driven by Phillips and in which Tolbert was a passenger, and as a result of an immigration search conducted by border patrol officers at a highway checkpoint.

We know these facts about the search in question. The checkpoint was located approximately 11 miles north of Laredo, Texas, (approximately 9 miles north of the city limits) on highway 35, the main highway from Laredo north to San Antonio. As the crow flies the point was three and a half to four miles from the Rio Grande River, the international boundary. It may fairly be inferred from overall consideration of this and other cases,[1] that the

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[1] E.g., United States v. Maggard, 451 F.2d 502 (CA5, 1971), cert. denied, 405 U.S. 1045, 92 S.Ct. 1330, 31 L.Ed.2d 587 (1972); United States v. DeLeon, 462 F.2d 170 (CA5, 1972), cert. denied, 414 U.S. 853, 94 S.Ct. 76, 38 L.Ed.2d 102 (1973); United States v. McDaniel, 463 F.2d 129 (CA5, 1972), cert. denied, 413 U.S. 919, 93 S.Ct. 3046, 37 L.Ed.2d 1041 (1973); United States v. Wright, 476 F.2d 1027 (CA5, 1973), cert. denied, 414 U.S. 821, 94 S.Ct. 116, 38 L.Ed.2d 53 (1973).

government employs a checkpoint with at least some degree of regularity a few miles north of Laredo on the main highway to San Antonio.

The location at which Phillips and Tolbert were stopped was divided into primary and secondary search areas. At around 8:00 a.m. the officers on duty were conducting what they termed a "blitz," checking for illegal aliens by stopping every vehicle that came through and opening the trunk of some or all.[2] They referred to this time of day as the "changeover period" (the appellation was unexplained), and there was testimony that this was a time when many vehicles were coming through and "we have had occasion to have other people try to bring aliens through the checkpoint at the changeover time." Officers were working in shifts, and the 8:00 a.m. to 4:00 p.m. shift was on duty, comprising at least three officers. Stop signs were up to stop vehicles.

[1, 2] A search of automobiles for aliens under the circumstances of this case is valid. See *United States v. DeLæon*, 462 F.2d 170 (CA5, 1972), *cert. denied*, 414 US 853, 94 S.Ct. 76, 38 L.Ed2d 102 (1973); *United States v. McDaniel*, 463 F.2d 129 (CA5, 1972), *cert. denied*, 413 US 919, 93 S.Ct. 3046, 37 L.Ed.2d 1041 (1973).[3] Once the search in the present case was begun, it was legitimate for the officers to look wherever there was room for an alien to hide, and to seize evidence of other crimes if it was in plain view. See *United States v. McDaniel, supra.*

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[2] At some places in their testimony officers implied they were searching the trunks of all cars. But at other places reference was made to "waving cars through" while the transactions involving defendants were taking place.

[3] The search in this case was pre-*Almeida-Sanchez*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973). The standards of that case are not retroactive. United States v Miller, 492 F.2d 37 (CA5, 1974).

Thus the District Court did not err in denying appellants' motion to suppress the marijuana found in the trunk of the rented car.

[3-5] We turn to the sufficiency of the evidence to establish that Tolbert knowingly possessed the marijuana.[4] Both the possession and the knowledge of possession can be proved by circumstantial evidence, *e.g.*, *Montoya v. United States*, 402 F.2d 847 (CA5, 1968), and possession may be actual or constructive but in any event there must be dominion and control over the item or a power to exercise dominion and control. There are numerous caveats that go along with cases of circumstantial evidence of knowing possession. No term is more ambiguous in common speech and in legal terminology than the word "possession," especially when it occurs in criminal statutory provisions, and "it is so fraught with danger that the courts must scrutinize its use with all diligence." *Guevara v. United States*, 242 F.2d 745 at 747 (CA5, 1957). "It is easy to get the eye off the target in a case like this, to focus so precisely on the inviting bullseye of the defendant's failure to give a credible explanation of why he was on the scene and what he was doing, that the requirement of possession never gets under the gunsight, and as a consequence the defendant is subjected to the critical inferences [here, the critical consequences of possession] not because he is a non-explaining possessor but because he is an incredible non-possessor who is where the action is." *Fitzpatrick v. United States*, 410 F.2d 513 at 515-516 (CA5, 1969). The line between knowing possession and guilt by association can be very thin. Proof of mere proximity to contraband

[4] No contention is made that the evidence of possession was insufficient as to Phillips.

is not sufficient to establish actual or constructive possession or the element of knowledge. *United States v. Canada*, 459 F.2d 687 (CA 5, 1972).

[6] Mindful of these commands that we proceed with caution,[5] we conclude that there was sufficient evidence to support a finding of knowing possession by Tolbert. There was evidence which the court was entitled to credit, to the following effect. Phillips and Tolbert had flown together from Detroit to Texas, and they had come together to Texas on this and prior occasions and had traveled about the state together. Phillips had rented the car at Harlingen, Texas, at which time the agent delivered to him an ignition key and a trunk key. There is no evidence that Tolbert ever had a trunk key in his possession, but he was at the rental agency with Phillips when the car was rented. The two men stayed the night together in a motel. There were four or more large suitcases in the trunk, only one small suitcase inside the car. When the car was serviced by the rental agency before delivery only the spare tire was in the trunk. When told by the officers that they were checking for aliens, Tolbert inquired whether they were searching for drugs. The quantity of contraband was large, the packages numerous and sizeable, and some of them were loose in the trunk. At least one package, about 15″ x 10″ x 4″, was removed by an agent, and at least one of the agents observed through the plastic covering leaves, stems and seeds. An agent felt one of the packages and could feel vegetable matter within. As soon as access was obtained to the trunk, there was in the rear seat area a

[5] See also the comments of Judge Tamm in United States v. Holland, 144 U.S.App.D.C. 225, 445 F.2d 701 (1971), pointing out the unsatisfactory and confused condition of the state of the law on proof of constructive possession, *e.g.*, "the law of constructive possession is what we will say it is in our next opinion." *Id.* at 704.

heavy smell of mothballs, whose odor is often used to mask the scent of marijuana, and there were moth flakes on the exterior of at least some of the packages.

[7] Both appellants denied the existence of a trunk key. Before entering the trunk the agents attempted to secure a key from the rental firm owning the car, which entailed a delay of about 10 minutes. During this interim they talked separately to Tolbert and Phillips who gave conflicting explanations for their presence in the area. Tolbert stated he was in Texas because of family trouble, while Phillips said the two of them were there for business reasons.[6]

Under all of these circumstances the court could conclude that both Phillips and Tolbert had knowing possession of the marijuana.

The cases relied upon by Tolbert do not require a different result. In *Montoya v. United States,* 402 F.2d 847 (CA 5, 1968), appellant Montoya was a passenger in the front seat of a pickup truck owned by a third person but driven by his brother-in-law. It had on the back an enclosed homemade camper with a door but without windows. Within was 539 pounds of marijuana in 25 large cloth sacks, inside of which were small plastic bags each containing a paper package of marijuana. On appeal we concluded that the jury must have totally rejected Montoya's incredible story of the events leading up to the arrest. This being so, there was no evidence of a joint undertaking other

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[6] Absent other and sufficient indicia of possession, a less-than-credible explanation by one in the proximity of contraband is not alone a ground for conviction. Fitzpatrick v. United States, 410 F.2d 513 at 516 n. 2 (CA5, 1969). But this is not to say that a less-than-credible explanation is not part of the overall circumstantial evidence from which possession and knowledge may be inferred.

than Montoya's presence in the vehicle as a passenger. Nor was there any evidence, other than Montoya's presence, that he had any reason to enter the enclosed portion of the truck or any nexus to it or any reason to be aware of the presence of the sacks, or, if he was aware of them, any knowledge of their contents. In a later case of marijuana in a car trunk we sustained the conviction of the passenger and distinguished *Montoya* because of evidence, from a statement made by the passenger, that he was aware of the presence of the contraband. *United States v. Canada, supra. United States v. Lowry,* 456 F.2d 341 (CA 5, 1972), also relied upon by appellants, is another case in which there was no basis for belief that the defendant either saw or knew of the existence of contraband in the vehicle. In *Cuthbert v. United States,* 278 F.2d 220 (CA 5, 1960), the defendants were on a lengthy trip together, and five pounds of marijuana was purchased by one defendant (an addict) at a time the other defendants were not present and subsequently was found in his baggage. We reversed as to another defendant because there was insufficient evidence that he ever saw or took possession of any of the contraband.

In *Guevera v. United States, supra,* a package containing 50 marijuana cigarettes was found on the floor underneath the front seat of Guevara's car, occupied by him as driver and another man as passenger, at a point about midway between Guevera's seat and the passenger's seat and in a position accessible to either occupant by simply lowering his hand. Police arrested Guevera but accepted the explanation of both men that the passenger was only being transported home, and released the passenger who went away not to be seen again. Conviction of Guevera was reversed on the ground of insufficient evidence of possession, there being "no rational connection between own-

ership and possession of the car and possession of the cigarettes." The court pointed out that the car had been unlocked and the cigarettes could have been placed therein by any person. The quantity was so small that one could infer the occupants had no knowledge of its presence. There was no pattern of extensive joint prior conduct. It was as reasonable to believe that the contraband belonged to the unknown passenger as to Guevara.[7] In the present case, the car was locked, the suitcases were in the trunk, the quantity of contraband very large, a key had been delivered to Phillips but both defendants denied its existence, and there was an extensive pattern of conduct indicating a joint undertaking but with the two participants giving conflicting descriptions of it. In *Ledet v. United States,* 297 F.2d 737 (CA5, 1962), the facts were similar to those of *Guevera,* plus evidence of other joint prior conduct including a lengthy trip together by the defendants, and we held the evidence sufficient, though barely so. The facts of the present case are stronger than *Ledet.* In *United States v. Duke,* 423 F.2d 387 (CA5, 1970), three men took a lengthy joint trip from the State of Washington to the Mexican border, followed by discovery near the border of a small quantity of heroin in the car in a Winston cigarette package. We held the evidence not sufficient to support possession by two of the occupants. The third man, Sanchez, was killed in an accident after arrest and before indictments were returned. He was the only one of the three men who spoke Spanish, the only one who smoked Winston cigarettes, the one who went to a bank near the border and borrowed money, the one most likely to be familiar with the area, and, additionally he was more

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[7] See e. g. United States v. Leazar, 460 F.2d 982 at 985, footnote 6 (CA9, 1972), distinguishing *Guevera.*

often separate from the other two, who usually were together. We held the evidence did not exclude the reasonable possibility that Sanchez alone possessed the heroin and that its presence was unknown to the others. There are no facts in this case tending to establish exclusive possession and knowledge by Phillips except that the car was rented by him and he was the driver.

The agents' efforts to secure a key from the rental company were fruitless. They then entered the trunk by lifting the seat portion of the rear seat and, with a wrench, unscrewing and removing the back of the rear seat, which made available a structural opening into the trunk area. Through the opening an agent could see packages and two or more suitcases which blocked further view of the interior of the trunk. He lifted out at least one package, tore a corner of a package and saw marijuana within. The entry into the trunk as part of an otherwise valid border search was not impermissible. *United States* v. *DeLeon*, 462 F.2d 170 (CA5, 1972); *United States v. Salinas*, 439 F.2d 376 (CA5, 1971); *Morales v. United States*, 378 F.2d 187 (CA5, 1967).

Other points raised by appellants require no discussion.

Affirmed.

APPENDIX B

JUDGMENT

No. 73-1230

Appeal from the United States District Court for the Southern District of Texas

Before WISDOM, GODBOLD AND INGRAHAM, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

July 15, 1974

Issued as Mandate November 13, 1974

APPENDIX C

United States Court of Appeals
Fifth Circuit
Office of the Clerk
November 5, 1974

To All Counsel of Record

Re: 73-1230 U.S.A. v. PHILLIPS

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing *en banc* has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth
Clerk
By: /s/ Anne G. Parent
Deputy Clerk

cc: Mr. Philip A. Gillis
Mr. Robert Darden

APPENDIX D

8 USC 1357 provides in pertinent part:

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

* * * * *

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens in to the United States; * * *

* * * * *

June 27, 1952, c. 477, Title II, ch. 9, § 287, 66 Stat. 233.

21 USC 811 provides:

(a) The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

Evaluation of drugs and other substances

(b) The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation of recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to

the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a) of this section.

Factors determinative of control or removal from schedules.

(c) In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

International treaties, conventions, and protocols requiring control

(d) If control is required by United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

Immediate procedures

(e) The Attorney General may, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section, place an immediate precursor in the same schedule in which the controlled substance of which it is an immediate precursor is placed or in any other schedule with a higher numerical designation. If the Attorney General designates a substance as an immediate precursor and places it in a schedule, other substances shall not be placed in a schedule solely because they are its precursors.

Abuse potential

(f) If, at the time a new-drug application is submitted to the Secretary for any drug having a stimulant, depressant, or hallucinogenic effect on the central nervous system, it appears that such drug has an abuse potential, such information shall be forwarded by the Secretary to the Attorney General.

Non-narcotic substances sold over the counter without a prescription; dextromethorphan

(g) (1) The Attorney General shall by regulation exclude any non-narcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription.

(2) Dextromethorphan shall not be deemed to be included in any schedule by reason of enactment of this subchapter unless controlled after the date of such enactment pursuant to the foregoing provisions of this section.

Pub.L. 91-513, Title II, § 201, Oct. 27, 1940, 84 Stat. 1245.

21 USC 812 provides in pertinent part:

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

Placement on schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) *Schedule I.*—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) *Schedule II.*—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) *Schedule III.*—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substances has a currently acepted medical use in treatment in the United States.

(C) Abuse of the drug or other substances may lead to moderate or low physical dependence or high psychological dependence.

(4) *Schedule IV.*—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substances may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) *Schedule V.*—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Schedule I

(a) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

• • • • •

(b) Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

• • • • •

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which

contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salt of isomers is possible within the specific chemical designation:

* * * * *

(10) Marijuana.

* * * * *

Pub.L.91-513, Title II, § 202, Oct. 27, 1970, 84 Stat 1247.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-703

ROBERT PHILLIPS AND WILLIAM ARNOLD TOLBERT, JR., PETITIONERS

v.

UNITED STATES OF AMEICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury-waived trial in the United States District Court for the Southern District of Texas, petitioners were convicted of possessing 230 pounds of marijuana, a controlled substance, with intent to distribute (21 U.S.C. 841 (a)(1)). Petitioner Phillips was sentenced to five years' imprisonment and a special parole term of five years, and he was fined $5,000. Petitioner Tolbert was sentenced to 40 months' imprisonment and a special parole term of two years. The court of appeals affirmed (Pet. App. A).

The evidence adduced at trial showed that petitioner Phillips, accompanied by petitioner Tolbert, rented a car from Avis in Harlingen, Texas, on May 4, 1972, at which time both an ignition key and a trunk key were given to Phillips by the rental agent (Tr. 7). Petitioners had flown

together from Detroit to Texas (Tr. 64) and had spent the night at a local Ramada Inn (Tr. 60-61). The next day, while driving the car near Laredo, Texas, the two were stopped at a fixed Border Patrol checkpoint on Interstate Route 35, about 11 miles north of Laredo, at which border Patrol agents were conducting vehicular inspections for illegal aliens (Tr. 11). The agents informed petitioners of the purpose of the stop and asked Phillips, the driver, to open the car truck (Tr. 12-13) Phillips responded, "you are not going to believe this, but I don't have a trunk key" (Tr. 14).

The car was directed to a secondary area, where petitioners feigned looking for the trunk key, both telling the officers that the trunk key had not been issued by the car rental agency (Tr. 16, 50). In speaking with the Border Patrol agents, Phillips and Tolbert gave conflicting stories as to the purpose of their visit to Texas. Phillips stated, "We are both in pharmaceutical or banking business down here and we are just down to Laredo for an overnight trip" (Tr. 15). Tolbert, on the other hand, stated that he had been having family trouble and had come to Texas "to see what was going on" (Tr. 37). The officers tried unsuccessfully to obtain a trunk key from Avis (Tr. 36). They then removed the back seat of the car in order to gain access to the trunk compartment. They discovered therein packages of marijuana covered with mothball shavings to conceal the odor (Tr. 37-39).

1. Petitioners argue (Pet. 13-17) that marijuana was not a controlled substance under Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1242, 21 U.S.C. 801, *et seq.*, on the day they were found in possession of 230 pounds of it. The Act establishes five schedules of controlled substances and provides that the schedules "shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this sub-

chapter and shall be updated and republished on an annual basis thereafter" (21 U.S.C. 812(a)). The date of enactment was October 27, 1970, and the two-year period referred to in the Act thus commenced on October 27, 1971.

On May 8, 1972, the Director of the Bureau of Narcotics and Dangerous Drugs issued an order, published in the Federal Register on May 12, 1972, updating and republishing the schedules "as of April 27, 1972" (37 Fed. Reg. 9545). The date on which petitioners were found in possession of the marijuana was May 5, 1972. Their contention is that they committed no crime because "marijuana did not continue as a controlled substance beyond April 27" (Pet. 13). On their theory, there could be no prosecution for possession of *any* controlled substance from April 28 through May 11, 1972, because the initial schedules lapsed six months after the two-year period commenced.

There is no basis, however, for petitioners' narrow interpretation of the word "semiannual" to mean precisely every six months. The word also means "twice a year" (*Webster's Seventh New Collegiate Dictionary*, p. 787). The updating and republication in May 1972 substantially fulfilled the legislative purpose.

Moreover, the Act does not provide that timely updating of the schedules is a precondition to prosecution for an unlawful act with respect to a controlled substance, and there is no reason to believe that Congress intended the drastic consequences urged by petitioners. Although Congress contemplated semiannual and annual reviews of the substances included in the five schedules, it specifically provided that the initial schedules would continue in force

"unless and until amended pursuant to section 811 of this title" (21 U.S.C. 812(c)).[1] There has been no such amendment with respect to marijuana.[2]

2. Petitioner Phillips argues (Pet. 18-19) that the district court should have ordered the Internal Revenue Service to return to him $5,100 taken from him at the time of his arrest and later seized by the IRS under a jeopardy assessment. As this Court has stated, however, "[w]here * * * adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained" (*Phillips* v. *Commissioner*, 283 U.S. 589, 595). See 26 U.S.C. 6331, 6851, 6861. Petitioner's remedy is to file a civil action for

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[1]Petitioners suggest (Pet. 14) that the reference to Section 811 was intended to apply only to "permissive modification" of the schedules by the Attorney General and not to the mandatory updating provided for in Section 812(a). But any change in the schedules at the time of an updating would obviously be made pursuant to Section 811, which is the source of the Attorney General's authority to add or remove a drug from the schedules.

[2]Petitioners also argue (Pet. 15-18) that marijuana is not properly listed as a Schedule I controlled substance because neither Congress nor the Attorney General has made the findings required by the Act for Schedule I substances. The Act states that "a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance" (21 U.S.C. 812(b)). The provision obviously requires the specified findings only when a drug is to be added to a schedule or transferred from another schedule (see 21 U.S.C. 811(a)(1)(B)).

refund if he believes the money was illegally assessed or collected (26 U.S.C. 7422). Petitioner does not claim that the IRS jeopardy assessment affected the fairness of his trial.[3]

3. Petitioner Tolbert contends (Pet. 19-23) that the evidence was insufficient to show that he was in possession of the marijuana. The contention was thoroughly considered and properly rejected by the court of appeals (Pet. App. 3a-8a), on whose opinion we rely. The court recognized that "[p]roof of mere proximity to contraband is not sufficient to establish actual or constructive possession or the element of knowledge" (*id.* at 3a-4a). Proceeding, therefore, "with caution," the court "conclude[d] that there was sufficient evidence to support a finding of knowing possession by Tolbert" (*id.* at 4a). "[T]he car was locked, the suitcases were in the trunk, the quantity of contraband very large, a key had been delivered to Phillips but both defendants denied its existence, and there was an extensive pattern of conduct indicating a joint undertaking but with the two participants giving conflicting descriptions of it" (*id.* at 7a).[4]

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[3]Petitioner suggests that money seized at the time of arrest "may represent [a defendant's] only resource to obtain counsel and otherwise prepare his defense" (Pet. 19). We assume, however, that the suggestion is hypothetical in substance as well as form. Petitioner Phillips, who has been represented from the outset by retained counsel, stated at a bond hearing after his conviction that he owns his own home and several residential and commercial rental properties, including a 26-unit apartment building (Tr. 100).

[4]Petitioner Tolbert claims that the evidence was "equivocal on the question of guilt" (Pet. 21) and that the court of appeals in effect held that "evidence consistent with guilt would sustain a conviction even though it spoke with equal voice that the defendant was innocent" (Pet. 23). As the court's lengthy discussion demonstrates, however, the evidence of guilt was compelling, not equivocal, and the court did not state or imply that the evidence "spoke with equal voice that the defendant was innocent."

4. Petitioners argue (Pet. 9-13) that the pre-*Almeida-Sanchez* search of their vehicle for aliens at a Border Patrol checkpoint was unlawful and that the fruits of the search should have been suppressed. The court of appeals rejected the contention on the ground that the principles of *Almeida-Sanchez* do not apply retroactively (Pet. App. 2a-3a, and n. 3). The questions whether checkpoint searches of vehicles for aliens are lawful and, if they are not, whether evidence seized in such searches prior to the decision in *Almeida-Sanchez* must be excluded at trial are before this Court in *United States* v. *Ortiz*, No. 73-2050, and *Bowen* v. *United States*, No. 73-6848, argued February 18, 1975. With respect to the similar issue in this case, we believe it would be appropriate to defer action on the present petition for a writ of certiorari pending the decisions in *Ortiz* and *Bowen*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-703

ROBERT PHILLIPS and
WILLIAM ARNOLD TOLBERT, JR.
Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITIONER'S REPLY

PHILIP A. GILLIS
Attorney for Petitioner
5th Floor, American Title Building
Detroit, Michigan 48226
(313) 962-8210

Lawyers Brief & Record Co., 1026 Brooklyn St., Detroit, Michigan 48226
WO. 1-8710—WO. 1-8711

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The government response asserts, at p. 5:

> Petitioner [Phillips] does not claim that the IRS jeopardy assessment affected the fairness of his trial.

This is not so. We would urge that a presumption of unfairness requires the return of the money.*

The government's footnote reference to Phillips' real estate holdings is entirely inappropriate. First, fact-finding is not the normal function of appellate courts, *DeMarco vs. United States,* 415 US 499 (1974). Second, Phillips should not have to make a showing that without the seized money he was "absolutely destitute." *Adkins vs. E. I. Dupont de Nemours,* 335 US 331 at 339-340 (1948).** Third, we don't know whether Mrs. Phillips would waive her dower rights to finance her husband's legal difficulties.

Finally, this Court has nothing before it to determine Phillips' liquidity which is the usual paramount concern of a criminal lawyer assessing a potential client. Had Phillips had the $5,000.00, he might have been able to get a lawyer good enough to win the case in one of the lower courts and the trip here wouldn't have been necessary.

Respectfully submitted,

PHILIP A. GILLIS
Attorney for Petitioners
5th Floor, American Title Building
Detroit, Michigan 48226
962-8210

Dated: March 25, 1975

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* Of course, if you are talking about a $300,000 seizure, cf. *Laing vs. United States,* 496 F 2d 853 (CA 2 1974), cert granted October 15, 1974 73-1808, maybe the defense could get along with a little less than the full amount seized.

Our petition does not address the statutory issues in *Laing* or *Hall vs. United States,* 493 F 2d 1211 (CA 6 1974), cert granted October 15, 1974, 74-75. Our claim is based upon the inherent power of a court to assure a defendant a fair trial. Cf. *Shapiro vs. Secretary of State,* 499 F 2d 527, 535-536 (CA DC 1974), cert granted February 18, 1975, 74-744, where the Court of Appeals noted that Shapiro needed the money to make bond in another court.

** We should allow for some hyperbole here. One's description of his holdings might vary considerably depending on whether he is talking to a judge about to fix his bail or a tax assessor about to value his property.

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PETITION FOR REHEARING OF DENIAL OF PETITION FOR CERTIORARI

PHILIP A. GILLIS
Attorney for Petitioner
5th Floor, American Title Building
Detroit, Michigan 48226
962-8210 (313)

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
962-8745—962-8732

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PETITION FOR REHEARING OF DENIAL OF PETITION FOR CERTIORARI

I.

On June 25, 1975, this Court ruled in *Peltier** that no imperative of judicial integrity required that *Almeida-Sanchez* be applied to other cases still on direct review raising the border-patrol search issue. On June 30, 1975, the Court denied our Petition for Certiorari while granting petitions in, among others: *Hart vs. United States*, 74-

* *United States vs. Peltier*, No. 73-2000, 43 LW 4918.

6014; *Jamney vs. United States,* 74-993; and *United States vs. Speed,* 74-599; and remanding the cases to the Fifth Circuit for reconsideration in the light of the latest border patrol search decisions of this Court.

Those cases involve the same search issue as ours; were tendered to this Court both before and after our Petition was filed; and are based upon factually indistinguishable records.** Simple fairness requires our case to be given the same consideration.

II.

Peltier offers still another test for determining retroactivity—whether the officers believed in good faith that their conduct accorded with the laws. A Petition for Rehearing is an unsturdy vehicle to persuade the Court that such a rule has the folly of requiring an appellate court to decide a controlling issue on the basis of a record in which the issue of good faith was not being litigated. But, even though the good faith issue, framed by this Court, was not in the minds of the parties during trial, our record suggests, (our Petition, pp. 12-13) that the officers were more concerned with contraband than with enforcement of the immigration laws. We should be allowed to make a record on this point, or, at the least, have the newly identified issue considered by the Fifth Circuit.

PHILIP A. GILLIS
Attorney for Petitioner
5th Floor, American Title Building
Detroit, Michigan 48226
(313) 962-8210

Dated: July 23, 1975.

** In *Speed,* for example, as in our case, defendants claimed to have lost the trunk key, and access was obtained by removing the back seat. 497 F 2d 546.

Certificate of Counsel

Counsel for petitioners certifies that this Petition for Rehearing is presented in good faith and not for the purpose of delay and that it is restricted to the grounds set forth in Rule 58 of this Court.

PHILIP A. GILLIS
Attorney for Petitioner